94

Supreme Court, U.S.
FILED

No. 07-1505 MAY 28 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

EDDIE GARCIA, EDDIE STEVE GARCIA, CYNTHIA GARCIA, on behalf of herself and as Guardian ad Litem for D.G., J.G.; and ESTATE OF FERNANDO GARCIA,

Petitioners,

vs.

SANTA CLARA COUNTY, and DEPUTY SHERIFF DAWSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVE M. DEFILIPPIS
(*Counsel of Record*)
RYAN RAMSEYER
PICONE & DEFILIPPIS
625 N. First St.
San Jose, CA 95112
(408) 292-0441 Fax: (408) 287-6550

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

WHETHER A LAW ENFORCEMENT OFFICER IS AUTHORIZED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO USE DEADLY FORCE AGAINST AN ARMED PERSON FLEEING FROM THE OFFICER, WHEN THAT PERSON HAS NOT OTHERWISE THREATENED THE OFFICER OR OTHERS.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Eddie Garcia, father of decedent Fernando Garcia;

Eddie Steve Garcia, brother of decedent Fernando Garcia;

Cynthia Garcia, mother of decedent Fernando Garcia;

D.G. (appearing through her Guardian ad Litem Cynthia Garcia), child of decedent Fernando Garcia;

J.G. (appearing through her Guardian ad Litem Cynthia Garcia), child of decedent Fernando Garcia;

Estate of Fernando Garcia, estate of decedent Fernando Garcia;

and,

County of Santa Clara, a political subdivision of the State of California,

Deputy Sheriff Seth Dawson, former Santa Clara County deputy sheriff.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	8
I. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH THE FEDERAL COURTS HAVE NOT UNIFORMLY DECIDED, AND WHICH SHOULD BE SETTLED BY THIS COURT	8
II. THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT TO RESOLVE THE QUESTION PRESENTED	13
CONCLUSION	14

TABLE OF CONTENTS – Continued

Page

APPENDIX

Memorandum of Decision of the Ninth Circuit Court of Appeals.....App. 1

Order of the District Court Granting Defendants' Motion for Summary Judgment.....App. 6

Judgment of the District Court.....App. 31

Order of the District Court Denying Relief.....App. 32

TABLE OF AUTHORITIES

Page

CASES

Billington v. Smith 292 F.3d 1177 (9th Cir. 2002) 9

Curnow v. Ridgecrest Police 952 F.2d 321 (9th Cir. 1991) 10, 11

Harris v. Roderick 126 F.3d 1189 (9th Cir. 1997) ... 10, 11

Leong v. Detroit 151 F.Supp.2d 858 (E.D. Mich. 2001) 11, 12

Tennessee v. Garner 471 U.S. 1 (1985) 3, 9, 10, 12, 13

Ting v. United States 927 F.2d 1504 (9th Cir. 1991) 11

CONSTITUTIONAL PROVISION

U.S. Const. Amend. IV 2, 3, 8, 9, 13

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1331 5

28 U.S.C. § 1343 5

28 U.S.C. § 1367 5

42 U.S.C. § 1983 ..... 1, 2, 5, 6

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 59 6

Federal Rule of Civil Procedure 60 6

PETITION FOR WRIT OF CERTIORARI

Petitioners Eddie Garcia, Eddie Steve Garcia, Cynthia Garcia, on behalf of herself and as Guardian ad Litem for D.G., and J.G., and the Estate of Fernando Garcia, respectfully petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Garcia v. Santa Clara County*, No. 06-15745.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and reproduced in the Appendix ("App.") at App. 1-5. The opinion of the District Court is unreported and reproduced in the Appendix at App. 6-30.

JURISDICTION

On February 29, 2008, the Ninth Circuit entered judgment. (App. 1-5.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners seek damages for violation of Decedent Fernando Garcia's rights under the Fourth Amendment to the United States Constitution pursuant to Title 42 United States Code, section 1983.

The Fourth Amendment to the United States Constitution establishes that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1983 of Title 42, U.S.C., establishes that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case involves an issue which the Courts of Appeals have grappled with after *Tennessee v. Garner*, 471 U.S. 1 (1985), and its progeny: whether a police officer is authorized under the Fourth Amendment to use deadly force to stop a fleeing person merely because he is in possession of a firearm. In this case, the Ninth Circuit answered that question in the affirmative.

In this case, the Ninth Circuit found that Decedent was in possession of a firearm at the time of his death. It also assumed for the purposes of its review that Decedent was facing directly away from the officer. It is undisputed that, apart from Mr. Garcia's possession of a firearm, the decedent had not otherwise threatened Deputy Sheriff Dawson prior to Mr. Dawson shooting him straight through the back.

The facts of this case are as follows:

Santa Clara County Sheriff's deputy Seth Dawson shot and killed Decedent Fernando Garcia on September 11, 2001, in San Martin, California.

Earlier that day, Michael Tovar called 911 and reported seeing two "suspicious" males on his semi-rural property in San Martin, California. (App. 6-7.) Approximately ten minutes after concluding the first call, Mr. Tovar again called and reported that the individuals he reported seeing "may have a gun." (*Id.*)

In response to Mr. Tovar's telephone calls, Deputy Sheriff Seth Dawson and Deputy Sheriff Robert Cisneros arrived at the Tovar residence.

Upon their arrival, Mr. Tovar led the deputies toward the side of the house, where they saw Decedent Fernando Garcia and Edmundo Solorzano. Deputy Dawson immediately drew his firearm and pointed it at Fernando Garcia, ordering Mr. Garcia and Mr. Solorzano to put their hands in the air.

Mr. Garcia stood up and asked "what did we do," while simultaneously making a sideways movement away from Mr. Dawson. Mr. Dawson yelled "stop," and Mr. Garcia ran into the backyard. While Mr. Garcia fled toward the back of the property, Mr. Solorzano ran in the opposite direction, around the front of the house.

Mr. Dawson chased Fernando Garcia into the backyard. Mr. Dawson asserts that Decedent stumbled and that when he did, a handgun fell out of Decedent's waistband. Mr. Dawson claims that Mr. Garcia picked up the handgun.

Under the facts assumed by the Court of Appeals, Mr. Garcia, after retrieving the gun, began to stand up facing directly away from Mr. Dawson.[1]

---

[1] Mr. Dawson has claimed that he shot Decedent when Decedent started to turn around, aiming his gun at Deputy Dawson. The trajectory of the bullet, however, as reported by both the County Coroner and an independent medical examiner,

(Continued on following page)

Mr. Dawson stopped, aimed, and fired one shot through Decedent's back, fatally wounding him.

Plaintiffs, the family and Estate of Fernando Garcia, filed their Complaint in the United States District Court for the Northern District of California on September 10, 2002, pleading causes of action for violation of civil rights under Title 42 U.S.C., section 1983, assault and battery, false arrest and imprisonment, intentional infliction of emotional distress, negligence, wrongful death, and negligent selection, training, retention, supervision, investigation and discipline.

The United States District Court had jurisdiction of this matter as a federal question pursuant to Title 28, U.S.C., section 1331, as a civil rights claim under Title 28, U.S.C., section 1343, and over the state law claims pursuant to its supplemental jurisdiction set forth at Title 28, U.S.C., section 1367.

Defendants, Seth Dawson and the County of Santa Clara, filed a Motion for Summary Judgment on January 23, 2004. In their Motion, Defendants argued that Plaintiffs could not make out a claim for a constitutional violation under section 1983 because

---

is consistent only with a shot fired at the victim while he was facing directly away from Deputy Dawson, and he physically could not have been twisting or turning around to fire at Dawson. Accordingly, the Court of Appeals assumed, for the sake of its review of the summary judgment motion, that this fact had been established in Plaintiffs' favor.

Mr. Dawson was objectively reasonable in killing Fernando Garcia, and that he was further protected by qualified immunity.

On March 29, 2004, Plaintiffs filed their Opposition to the Motion for Summary Judgment. Plaintiffs argued that Mr. Dawson was not "objectively reasonable" in killing Fernando Garcia because Decedent had not threatened him before Mr. Dawson shot him through the back.

On September 29, 2004, the District Court below issued an order in which it determined that there were no genuine issues as to any material facts regarding the circumstances surrounding the killing of Fernando Garcia, and that Mr. Dawson was objectively reasonable in shooting Mr. Garcia. The Court based this holding upon its acceptance of Mr. Dawson's story that Mr. Garcia had been turning to shoot at him at the time that the officer shot and killed Decedent.

The Court concluded that since Dawson's actions were objectively reasonable, neither he, nor the County, could be liable under section 42 U.S.C. § 1983. A judgment was issued that same day.

Plaintiffs filed a Motion for Relief based upon Federal Rules of Civil Procedure 59(e), and 60(b), on October 13, 2004. In that Motion, Plaintiffs pointed out the substantial evidence produced by Plaintiffs, which demonstrated that Fernando Garcia had been shot through the back while he was facing directly away from Dawson. This evidence gave rise to the

conclusion that Mr. Garcia was not turning around to confront Mr. Dawson, as Defendant had testified.

The District Court denied the Motion for Relief on April 6, 2006. Plaintiffs' Notice of Appeal was filed on April 11, 2006.

On Appeal, Petitioners argued that the District Court had erred in granting summary judgment because there was substantial evidence to demonstrate that Decedent, Fernando Garcia, had not been turning to threaten Mr. Dawson at the time that Dawson shot and killed him. Accordingly, Petitioners argued, Mr. Dawson was not "objectively reasonable" in shooting and killing Mr. Garcia.

Respondents, on Appeal, argued that, assuming that Mr. Garcia had not been turning around to threaten Mr. Dawson with his firearm, Mr. Dawson was still objectively reasonable in shooting him, because Mr. Garcia posed a risk of serious physical harm or death because of his possession of a firearm and his proximity to the officer.

The Court of Appeals held that the District Court had erred in finding that Mr. Garcia had been turning to threaten Mr. Dawson. At the same time, however, the Court of Appeals held that the District Court had not erred in its ultimate ruling granting the summary judgment. The Court of Appeals held that Mr. Dawson had been objectively reasonable in using deadly force against Mr. Garcia because Decedent was in possession of a firearm, and because he was approaching a

fence, and might turn around and threaten the officer.

REASONS FOR GRANTING THE PETITION

I. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH THE FEDERAL COURTS HAVE NOT UNIFORMLY DECIDED, AND WHICH SHOULD BE SETTLED BY THIS COURT

A writ of certiorari is warranted because the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. That is, whether a law enforcement officer may use deadly force to seize a fleeing person when that person is in possession of a firearm, but has not explicitly threatened the officer or any other person.

This Court held in *Tennessee v. Garner*, 471 U.S. 1 (1985) that the use of deadly force by a law enforcement officer against a person is a seizure under the Fourth Amendment to the United States Constitution.

> "Whenever an officer restrains the freedom of a person to walk away, he has seized that person . . . While it is not always clear just when minimal police interference becomes a seizure . . . there can be no question that apprehension by the use of deadly force is a seizure subject

> to the reasonableness requirement of the Fourth Amendment." *Id.*, at p. 7.

Holding that the intrusiveness of a seizure by the use of deadly force is unmatched, this Court held that such a seizure is only justified:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.*, at pp. 11-12.

Under *Tennessee v. Garner,* therefore, it is clear that when a suspect actually threatens a law enforcement officer with a weapon, the officer will be legally justified in using deadly force. As the District Court below held:

> "The application of *Garner* is clear in many cases. For example, if a suspect threatens an officer with a gun or a knife then the officer is justified in using deadly force. *See, e.g., Billington* [*v. Smith*] 292 F.3d [1177 (9th Cir. 2002)] at 1185 (holding that deadly force was justified where a suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun)." (App. 16.)

While a law enforcement officer may use deadly force to seize a person who has actually threatened him with a weapon, it is equally clear under *Tennessee v. Garner* that "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

The question presented by this case falls between the two poles addressed by *Tennessee v. Garner*. Here, Fernando Garcia did not actually threaten Sheriff's Deputy Dawson with a firearm. He was not, however, "unarmed." The important question of federal law presented here, the answer to which is likely to have significant impact, is whether a law enforcement officer may use deadly force to seize a fleeing person merely because he is armed.

The federal courts have addressed this question, but no uniform answer has been given. Ironically, prior to the Ninth Circuit's decision in this case, it had been the clearest source of federal law on the issue. As the Ninth Circuit had previously held, the mere fact that a suspect possesses a weapon does not justify deadly force.

In *Harris v. Roderick*, 126 F.3d 1189, 1202 (9th Cir. 1997), the Ninth Circuit held in the Ruby Ridge civil case that the FBI's directive to kill any armed adult male was constitutionally unreasonable even though a United States Marshal had already been shot and killed by one of the males.

In *Curnow v. Ridgecrest Police*, 952 F.2d 321, 324-25 (9th Cir. 1991), the Ninth Circuit held that

deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot.

In *Ting v. United States*, 927 F.2d 1504, 1508-11 (9th Cir. 1991), the Ninth Circuit held that the use of deadly force was unreasonable where a suspect had dropped his gun.

While, prior to its decision in this case, the Ninth Circuit had held that a law enforcement officer is not justified in using deadly force merely because of the fleeing person's possession of a weapon, the courts have not uniformly agreed upon this proposition.

In *Leong v. Detroit*, 151 F.Supp.2d 858 (2001), the District Court for the Eastern District of Michigan decided a case involving the shooting death of an armed suspect. In that case, officers had shot and killed a man who was armed with a firearm, after he had refused to lay down his weapon and surrender. There was evidence presented to the court that the decedent in that case had been shot in the back by the officers. In granting summary judgment, after reviewing *Curnow, supra,* and *Harris, supra*, the court held that:

> "Plainly, an armed and gun-wielding suspect can turn and train his weapon on an officer or bystander in an instant, with disastrous consequences. This Court is aware of no case, and Plaintiff has not cited one, which would compel a police officer to await such an occurrence, despite otherwise having determined that a suspect is armed and poses an

> imminent threat of serious harm to the officers or others in the vicinity." *Leong*, *supra*, at p. 866.

In its memorandum of decision in this case, the Ninth Circuit Court of Appeals held that:

> "As Garcia approached the fence he stumbled, and a gun fell out of his waistband. Garcia, trapped between the officer and the fence, was *again* ordered to stop; instead he picked up the gun as he regained his balance, and it was reasonable for Dawson to believe that he faced an imminent risk of death or serious physical injury from the cornered suspect. Indeed, it was reasonable for Dawson to conclude that Garcia had picked up the gun to facilitate his escape. Maybe Garcia reacquired the gun for some benign purpose as he approached the dead end, but Dawson 'need not have taken that chance and hoped for the best.'" App. 3.

The reasoning of the courts in both *Leong* and the case presented here, justifies the use of deadly force against a fleeing person based solely on the fact that he is running from law enforcement officers and in possession of a firearm. The possession of any weapon inherently involves risk of harm. Under the holding of *Tennessee v. Garner*, *supra*, however, in order for the state to justify its use of deadly force, it must demonstrate that the person seized by deadly force actually presented a threat of serious physical harm or death. Regarding weapons, *Tennessee v. Garner* held that deadly force is justified where the person

seized threatened the officer with the weapon. Whether possession of a weapon alone presents a sufficient threat of serious physical harm to justify a seizure by the use of deadly force is a question that has not been answered by this Court. It should be answered in order to ensure uniformity in the law, and to resolve this important question of federal law.

II. THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT TO RESOLVE THE QUESTION PRESENTED

This case presents a perfect opportunity for this Court to decide whether a fleeing person's possession of a firearm is sufficient justification for use of deadly force under the Fourth Amendment.

This case is very similar in its facts to those of the seminal case in this area of law, *Tennessee v. Garner*, *supra*. In both *Tennessee v. Garner*, and this case, the people killed were fleeing from law enforcement officers. In both this case and *Tennessee v. Garner*, the law enforcement officers shouted at the fleeing people to stop. The key difference between *Tennessee v. Garner* and the case at bar is that which presents the important question of federal law; that is, that in this case the Decedent possessed a firearm, and in *Tennessee v. Garner* the boy who was killed did not possess a weapon. The similarities of these two cases on their facts would highlight the important question of law presented by this case. A decision in

this case would fill a substantial gap in this area of jurisprudence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVE M. DEFILIPPIS
(*Counsel of Record*)
RYAN RAMSEYER
PICONE & DEFILIPPIS
625 N. First St.
San Jose, CA 95112
(408) 292-0441 Fax: (408) 287-6550

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE GARCIA; et al., Plaintiffs-Appellants, v. SANTA CLARA COUNTY; et al., Defendants-Appellees.	No. 06-15745 D.C. No. CV-02-04360-RMW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted February 14, 2008
San Francisco, California

(Filed Feb. 29, 2008)

Before: SILVERMAN, McKEOWN, and TALLMAN, Circuit Judges.

The Estate of Fernando Garcia and several of his survivors appeal from the district court's order granting summary judgment in favor of Deputy Sheriff Seth Dawson and Santa Clara County. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellants assert that Dawson unreasonably used deadly force against Fernando Garcia in violation of the Fourth Amendment, and that the district court therefore erred in its determination that Dawson was entitled to qualified immunity because the officer reasonably believed Garcia was armed and intent on harming him. We consider first whether there are genuine issues of material fact regarding the reasonableness of Dawson's conduct. *See Saucier v. Katz,* 533 U.S. 194, 201, 204-05 (2001).

There is no genuine dispute that Garcia was in possession of a semi-automatic handgun; Dawson's testimony that Garcia was armed was corroborated by his criminal partner, Solorzano, and Appellants' imaginative suggestion that the gun found next to Garcia at the scene of the shooting was planted by the officers is unsupported by any evidence. There *does,* however, appear to be a genuine factual dispute regarding Garcia's position relative to the officer when he was shot. On this appeal from summary judgment we take as true the plaintiffs' version of events. *See Blanford v. Sacramento County,* 406 F.3d 1110, 1112 fn. 2 (9th Cir. 2005).

Nonetheless, we hold that Officer Dawson's conduct did not violate the Fourth Amendment. Even if Garcia were running directly away from Dawson when the bullet struck, uncontradicted facts in the record demonstrate that Dawson had "probable cause to believe that [Garcia] pose[d] a significant threat of death or serious physical injury," rendering Dawson's use of deadly force constitutionally reasonable.

Tennessee v. Garner, 471 U.S. 1, 3 (1985). Garcia had already disregarded Dawson's initial order to put his hands in the air, and his subsequent order to stop. Garcia instead took off running towards the back fence of the property, with Dawson in foot pursuit. As Garcia approached the fence he stumbled, and a gun fell out of his waistband. Garcia, trapped between the officer and the fence, was *again* ordered to stop; instead he picked up the gun as he regained his balance, and it was reasonable for Dawson to believe that he faced an imminent risk of death or serious physical injury from the cornered suspect. Indeed, it was reasonable for Dawson to conclude that Garcia had picked up the gun to facilitate his escape. Maybe Garcia reacquired the gun for some benign purpose as he approached the dead end, but Dawson "need not have taken that chance and hoped for the best." *Scott v. Harris,* 127 S.Ct. 1769, 1778 (2007).

We are cognizant that Dawson is the only direct source of evidence that Garcia dropped the gun when he tripped, and then retrieved it as he regained his balance. Such a circumstance presents the need to "ensure that the officer is not taking advantage of the fact the witness most likely to contradict his story – the person shot dead – is unable to testify." *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994). A searching review of the record reveals that aside from the question of whether Garcia was turning back towards the pursuing officer in an attempt to point his weapon at Dawson at the moment. the Deputy fired, Dawson's account is not only uncontradicted but is

corroborated in important respects. Solorzano testified that Garcia was armed when the two arrived at the property where the shooting took place, and that they had gone there to collect a drug debt. Solorzano also confirmed that Garcia was running with his gun out while being chased by Dawson. Deputy Cisneros likewise confirmed that Garcia was running towards the rear fence and that Garcia stumbled; although Cisneros did not see Garcia's gun during the chase, he did see it immediately after the shooting when Cisneros approached to check Garcia's vital signs. Toxicology testing showed that Garcia was acutely intoxicated with methamphetamine at the time of his death, providing circumstantial corroboration of Dawson's account of Garcia's behavior leading up to the shooting. Thus, we have not "simply accept[ed] what may be a self-serving account by the police officer" in concluding that Dawson's use of deadly force was objectively reasonable under the Fourth Amendment. *Id.* at 915.

Because Dawson's conduct satisfied the deadly force requirements of the Fourth Amendment, the district court properly concluded that he is entitled to qualified immunity, and Santa Clara County bears no municipal liability for Garcia's death. *See Long v. City and County of Honolulu*, 511 F.3d 901, 907 (9th Cir. 2007).

Appellants' state law claims are likewise precluded: under California law, police officers are not subject to civil liability for the use of lethal force where "the circumstances reasonably created a fear of

death or serious bodily harm to the officer or to another." *Martinez v. County of Los Angeles,* 47 Cal. App. 4th 334, 349 (1996). The state law claims of the Estate of Fernando Garcia would be barred regardless of the reasonableness of Dawson's conduct because the Estate failed to comply with Cal. Gov. Code §§ 911.2 and 945.6, as the district court correctly held.

Finally, because the uncontradicted evidence in the record indicates that Garcia would not have been saved by immediate medical attention, Appellants cannot demonstrate that Garcia's constitutional rights were violated by the length of time that elapsed between the shooting and Garcia's examination by medical personnel. *See Brower v. County of Inyo,* 489 U.S. 593, 599 (1989) (allegedly unconstitutional conduct must be the proximate cause of injury to trigger liability under 42 U.S.C. § 1983).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EDDIE GARCIA; EDDIE STEVE GARCIA; CYNTHIA GARCIA, on behalf of herself and as Guardian ad Litem for DEVANNA GARCIA, JUSTINE GARCIA; and ESTATE OF FERNANDO GARCIA,

Plaintiffs,

v.

SANTA CLARA COUNTY; DEPUTY SHERIFF DAWSON; and DOES 1-100,

Defendants.

E-FILED - 9/29/04

CASE NO.:
C-02-04360 RMW

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Re Docket No. 76]

The motion for summary judgment brought by defendants Santa Clara County and Deputy Sheriff Dawson's was heard on April 16, 2004. For the reasons set forth below, the motion is granted.

I. BACKGROUND

This civil rights action arises out of Santa Clara County Sheriff's Deputy Seth Dawson's fatal shooting of Fernando Garcia. On September 11, 2001 at approximately 12:20 p.m., a 911 call was received from Michael Tovar reporting that there were two

suspicious males on his property. (Brown Aff. ¶ 2). Santa Clara County Sherriff Deputy Robert Cisneros was dispatched to investigate at 12:25 p.m., and Deputy Dawson accompanied him. (DeFilippis Decl., Ex. M – Internal Affairs Investigation Memorandum ("Internal Affairs Memo") at 2).

Approximately ten minutes after his first call, Tovar made a second 911 call inquiring when the officers would arrive because he was scared. (Brown Aff. ¶ 5). Tovar recalls telling the 911 operator that he thought the intruders "may have a gun." (Reply Aff. Schmid, Ex. CC ("Tovar Depo.") at 132:17). During this second call, the deputies arrived and the conversation ended. (*Id.*).

When the deputies arrived, Tovar came out of his house to meet them in the driveway. (Tovar Depo. at 75). Moments later, Tovar's friend Monica Calderon came running from the house crying and joined the deputies and Tovar. (Tovar Depo. at 136:10-19). Tovar explained that he had seen two men watching his house and then run around to the side of the house. (DeFilippis Decl. Ex. E, Shooting Review Board Results ("Shooting Board") at 1). Deputy Cisneros testified that he recalls Tovar saying "these guys are dangerous" and that they may have "a gun." (Schmid Aff. Ex. DD ("Cisneros Depo") at 27:12-25). The deputies left Tovar and proceeded around the corner of the house, with Deputy Dawson in the lead. (Shooting Board at 2). As Dawson rounded the corner he saw the two suspects, Edmundo Solorzano and Fernando Garcia.

Dawson drew his weapon as he approached the suspects. Dawson says he drew his weapon because he recognized the men were dressed in gang type clothing, and since they had "stayed at the residence instead of just cutting through the yard." He felt they were not merely trespassers. (Shooting Board at 2). While aiming his weapon at the men, Dawson verbally commanded them to stop and put their hands up. (Dawson Aff. ¶ 4). Solorzano put his hands up. (*Id.*). Garcia began to ask "What did we do" as he made a hopping-sideways movement away from Dawson. (*Id.*; Internal Affairs Memo at 7). Dawson again yelled "stop" but Garcia "took off running into the back area of the property." (*Id.*). Garcia was actually intoxicated with methamphetamine. (Melnick Decl. at #8). When Garcia began to flee, Solorzano also fled, running in the opposite direction across the front of the house. (DeFilippis Decl. Ex. F ("Solorzano Depo") at 38:2-13). However, both Dawson and Cisneros ran after Garcia, with their guns pointing at him. (Solorzano Depo. at 36:14-15).

Garcia only managed to run a few feet before he stumbled. He was nearing a chain link fence at the northwest corner of the property, running with his hands in his waistband. (Dr. Cooper Decl. Ex. C ("Dawson Depo.") at 66:1-3). Cisneros also said Garcia's hands were at his mid-section. As he stumbled Garcia caught himself with his hands. At that moment, Dawson says he saw a gun fall from the waistband of Garcia's pants and land near Garcia's hand. (Dawson Depo. at 67:7-18). Cisneros was unable to

keep pace with the foot pursuit and fell behind by approximately twenty feet. (Internal Affairs Memo at 12). Nevertheless, he maintained his focus on Dawson. When Cisneros saw Garcia stumble and then stop, he claims to have looked away thinking Garcia had surrendered. Instead, Garcia grabbed the gun, pushed himself up, and began running again. (Dawson Depo. at 70:2-7).

According to Dawson, as Garcia began to run he also started turning or twisting around clockwise, making a sweeping motion with his right arm. He moved the gun across his body until it was visible underneath his left bicep. (Dawson Depo. at 70:2-16). Dawson believed Garcia was attempting to position the gun under his armpit to fire back at Dawson. (Internal Affairs Memo at 5). Dawson took one side step to his right and fired one shot from his handgun striking Garcia in the back. Dawson explained that Garcia continued turning as he fell and came to rest on his back with his arms out stretched.

As the chase began, Tovar and Calderon ran into the house and did not see the shooting. While Solorzano was fleeing, he claims to have turned back just long enough to see that Dawson and Garcia both had their guns out and saw Garcia get shot. (Solorzano Depo. at 39:9-22). Cisneros does not claim to have seen a gun before the shooting, but he did see out of his peripheral vision some dark object fall from Garcia's body as Garcia fell. The gun landed near Garcia's right hand. (*Id.*). Dawson kicked the gun approximately ten feet away from Garcia's hand.

(Dawson Depo. at 72:11-12). In doing so, the magazine separated from the gun. (*Id.* at 72:21-24). Cisneros searched for signs of life, but was not able to find any. (*Id.*).

The dispatcher states that immediately after a report of shots fired was made to dispatch a request for fire and paramedics was made. (Brown Aff. ¶ 6). Sergeant Kirts was the first sergeant to respond to the scene after the shooting. A request for paramedics had already been made by the time he arrived, but after waiting five minutes he made a second request. (DeFilippis Decl. Ex. N – Report of Kirts). California Department of Forestry Captain Curt Itson was the first medical emergency trained person to arrive on the scene. Itson received the report of a shooting at approximately 1:00 pm and arrived at the scene shortly thereafter. (DeFilippis Decl. Ex. H, Report of Itson). Initially, Sergeant Kirts would not allow paramedics, including Itson, to enter the area because he did not deem it secure. (*Id.*). But then Kirts asked Itson to determine if Garcia was dead. At 1:08 p.m. Itson was permitted to check Garcia for signs of life, and determined that he was dead. (*Id.*).

In the course of the subsequent investigation, an autopsy was performed on Garcia. The County's Coroner determined the direction of fire was from back to front, approximately 20 degrees upward and minimally from left to right. (Melinek M.D. Aff. ¶ 5). The Coroner believes her findings are consistent with Dawson's statement that Garcia was in motion, possibly twisting at the time he was shot. (*Id.*). She

also believes that due to the severity of Garcia's internal injuries, it was unlikely that immediate medical attention would have saved his life. (*Id.* at ¶7).

Solorazno [sic] states that Garcia showed him a gun in his pants upon arrival at Tovar's residence. (Solarzano [sic] Depo. at 15:1-21). The Sheriff Department ran a check on the gun found next to Garcia's body to see if it was reported stolen. Sergeant Langley determined the weapon belonged to a reserve Gilroy police department officer and had been reported stolen from a truck the night before the incident. The Santa Clara County Crime Lab examined the gun and magazine but found the fingerprint smudges left on the gun unusable for purposes of identification. (Reneau Decl. in Support of Mot. ¶ 6).

After investigating the incident the Sheriff's Department recommended Dawson be exonerated. Plaintiffs filed one governmental tort claim on March 7, 2002. The notice failed to name the Estate of Fernando Garcia as a claimant. Subsequently, plaintiffs filed this action against defendants alleging that Dawson shot and killed Garcia while he was on his knees with his hands in the air, planted a gun on the scene, and failed to provide medical care. Plaintiffs' allegations are contained in ten separate causes of action: (1) 42 U.S.C. §1983 for violation of civil rights against Dawson only; (2) 42 U.S.C. §1983 *Monell* claim against the County; (3) Assault and Battery against Dawson only; (4) False Arrest and Imprisonment against Dawson only; (5) Intentional Infliction

of Emotional Distress; (6) California Civil Code §52.1 (Unruh Act); (7) Negligence; (8) Negligent Training, Selection, and Supervision against the County only; (9) Negligent Wrongful Death; and (10) Intentional Wrongful Death. The causes of action seek damages for the loss of care, comfort, and society resulting from the loss of a family member.

On August 21, 2003, this court issued an Order Granting Defendants' Motion for Judgment on the Pleadings as follows:

(1) Plaintiff Eddie Steve Garcia (Fernando's brother): all federal and state claims were dismissed, with leave to amend only for the state claims for wrongful death if plaintiff could allege in good faith that he was a minor who had lived in decedent's household for more than 180 days and was dependent on the decedent for support; and

(2) Plaintiffs Eddie and Cynthia Garcia (Fernando's father and mother): state claims for wrongful death were dismissed with leave to amend if plaintiffs could allege in good faith that they were financially dependent on the decedent; and the remaining state claims of assault and battery, false arrest and imprisonment, intentional infliction of emotional distress, and California Civil Code section 52.1 were dismissed without leave to amend.

Plaintiffs Eddie Steve Garcia, Eddie Garcia, and Cynthia Garcia were required to file an amended complaint by August 31, 2003 but did not do so. Thus, all of their claims are dismissed. Therefore, this

motion addresses only: (1) the federal claims of Eddie and Cynthia Garcia under section 1983; (2) all federal and state claims of Devanna and Justin Garcia (Fernando's children); and (3) all claims of the Estate of Fernando Garcia.

II. ANALYSIS

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of establishing that there is no genuine issue of material fact. *Id.*; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). After the moving party makes a properly supported motion, the responding party must present specific facts showing that a triable issue of fact exists. *British Airways Board v. Boeing Co.,* 585 F.2d 946, 950-52 (9th Cir.1978), *cert. denied,* 440 U.S. 981 (1979). It is not enough for the responding party to point to the mere allegations or denials contained in the pleadings. Instead, it must set forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual issue for trial. The evidence must be more than a mere "scintilla"; the responding party must show that the trier of fact could reasonably find in its favor. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 252 (1986). In reviewing a motion for summary judgment, the court must take the responding party's evidence as true and all inferences are to be drawn in its favor.

Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1289 (9th Cir. 1987).

A. Excessive Force Claim under § 1983

It is undisputed that Deputy Dawson shot and killed Garcia. Plaintiffs contend Dawson's use of deadly force against Garcia amounted to excessive force in violation of the Fourth Amendment,[1] giving rise to liability under 42 U.S.C. § 1983 and state tort law.[2] Defendants contend that Dawson is entitled to qualified immunity from plaintiffs' Fourth Amendment claim. Following the Supreme Court's ruling in *Saucier v. Katz*, 533 U.S. 194 (2001), the court must undertake a two-step analysis when a defendant asserts qualified immunity in a motion for summary judgment. *Haugen v. Brosseau*, 351 F.3d 372, 380 (9th Cir. 2003). First, the court must answer "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show

---

[1] Plaintiffs' claim for their individual losses from Garcia's death as opposed to claims brought on behalf of Garcia, arise under the Fourteenth Amendement [sic] (due process) and not the Fourth Amendment. *See Moreland v. Las VegasMetropolican* [sic] *Police Department*, 159 F.3d 365, 369 (9th Cir. 1998).

[2] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U.S.C. § 1983.

the officer's conduct violated a constitutional right?" *Katz,* 533 U.S. at 201. Second, if the evidence supports a finding that a constitutional right has been violated, the court then "ask[s] whether the right was clearly established" such that "it would be clear to a reasonable officer that [his] conduct was unlawful in the situation he confronted." *Id.*, at 201-202.

1. Whether Shooting Violated Garcia's Constitutional Rights

Excessive force claims in the arrest context, brought under 42 U.S.C. § 1983, are analyzed under the Fourth Amendment's reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 395 (1989). Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances. *Id.* at 397. "The reasonableness inquiry is objective, without regard to the officer's good or bad motivations or intentions." *Billington v. Smith,* 292 F.3d 1177, 1185 (9th Cir. 2002). Reasonableness must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and allow "for the fact that [peace] officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396.

In *Tennessee v. Garner,* 471 U.S. 1, 11 (1985) the Supreme Court explained that a law enforcement officer may reasonably use deadly force where he "has

probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Based upon this principle, the Ninth Circuit stated, "[l]aw enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons." *Harris v. Roderick,* 126 F.3d 1189, 1201 (9th Cir. 1997). The application of *Garner* is clear in many cases. For example, if a suspect threatens an officer with a gun or a knife then the officer is justified in using deadly force. *See, e.g., Billington,* 292 F.3d at 1185 (holding that deadly force was justified where a suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun). "On the other hand, the mere fact that a suspect possesses a weapon does not justify deadly force." *Haugen,* 351 F. 3d at 381; *see, e.g., Curnow v. Ridgecrest Police,* 952 F.2d 321, 324-25 (9th Cir. 1991) (holding that deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot him).

"Even though reasonableness is traditionally a question of fact for the jury, defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances." *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1992).

The court must be careful, however, as the officer who used the force may be the only surviving witness.

> Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. *Hopkins,* 958 F.2d at 885-88; *Ting v. United States,* 927 F.2d 1504, 1510-11 (9th Cir. 1991). In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.

Id. (affirmed in *Billington,* 292 F.3d at 1181).

The evidence here looked at in the light most favorable to plaintiffs establishes that Dawson had probable cause to believe that Garcia posed a significant threat of death or serious physical injury to Dawson. First, Dawson observed that Garcia was in

possession of a firearm. Second, Dawson saw Garcia pick up the gun, and begin to twist backwards towards Dawson, and move his arm holding the gun in Dawson's direction. Third, the events occurred during a foot pursuit in which Garcia was attempting to escape.

When an armed suspect runs from a deputy after the deputy has drawn his weapon and ordered the suspect to stop, there is a reasonable threat the suspect will use the firearm against the deputy in order to escape. *See Garner,* 471 U.S. at 11. When, in the midst of a foot pursuit, the deputy sees the suspect, with gun in hand, turn back towards the deputy without stopping, the threat of armed retaliation becomes a significant threat. *c.f. Figueroa v. Gates,* 207 F. Supp. 2d 1085, 1093-94 (C.D. Cal. 2002) (deadly force unreasonable when decedents had not fled and had not threatened the officers with weapons). Dawson saw Garcia stumble while fleeing, drop a gun, pick it up, and then twist backwards towards Dawson. At that point, Dawson use of deadly force was objectively reasonable.

Plaintiffs argue there is not sufficient evidence showing: (1) Garcia was in possession of a gun; and (2) that Garcia was turning or twisting back towards Dawson, when he was shot. Plaintiffs' theory is that all the deputies involved in the shooting and the subsequent investigation engaged in a cover up, planted a weapon on Garcia after the shooting and fabricated a story to justify Dawson's use of deadly force. Plaintiffs, however, provide no competent

evidence supporting their theory or contradicting the material facts supported by defendants' evidence. Nevertheless, since the primary witness to Garcia's shooting was the deputy defendant, plaintiffs' arguments and evidence must be carefully examined. *See Scott,* 39 F.3d at 915.

a. Whether Garica [sic] was in Possession of a Gun

Plaintiffs dispute Dawson's claim that Garcia was in possession of a gun at the time of the shooting. However, defendants' evidence supporting this fact is not based solely on Dawson's testimony. Both Solorzano and Cisneros provide cooroborating [sic] testimony. Solorzano states that Garcia showed Solorzano a gun in the waistband of Garcia's pants just before getting out of their car to go onto Tovar's property. (Solorzano Depo. at 15:16-21). Plaintiffs argue that Solorzano could be lying to curry favor with the prosecutors or law enforcement because he faced criminal proceedings due to the incident. Yet, Solorzano has already received a seven year sentence for his involvement in the incident. (*Id.*, at 105:16-25). Thus, plaintiffs have no factual basis for their speculations that Dawson is lying about Garcia's possession of a gun.

Plaintiffs also argue Cisneros cannot provide testimony that Garcia was in possession of a gun because he did not see a gun until after Garcia was shot. However, Cisneros does recall seeing something

fall from Garcia's body after Garcia was shot. (Cisneros Depo. at 74:17-20). Immediately thereafter, Cisneros saw the gun laying near Garcia's body. Sergeant Kirts, the first sergeant to arrive on the scene, also observed the gun lying next to Garcia's body.

Plaintiffs attempt to raise the spectre of a cover-up by pointing to the fact that the gun found next to Garcia's body was reported stolen from a Gilroy reserve police officer. Supplemental materials, supplied at the request of the court include undisputed documentary and testimonial evidence that the gun had been reported stolen two nights before Garcia's death. The gun was issued by the Gilroy Police Department to reserve officer Jason Pacheco. On the night of September 10, 2001 Officer Pacheco had left the gun in a duffle bag stored in his brother Jacob Pacheco's ("Jacob") truck. (Jacob Pacheco Aff. in Support of Mot. ("Pacheco Aff.") ¶ 2). Jacob testifies that at approximately 4:00 a.m. on September 10, 2001 he heard his truck alarm sounding. (*Id.*). He went outside to find his truck had been burglarized and the duffle bag missing. (*Id.* at ¶ 2). Jacob promptly notified the police. (*Id.* at ¶ 2). Gilroy Police Officer Justin Matshura [sic] states that at approximately 4:16 a.m. that night, he responded to Jacob's residence. (Matsuhara Aff. in Support of Mot. ("Matsuhara Aff.") ¶ 4). Jacob also contacted his brother that night and learned from him that the gun was in the missing bag. Jacob, therefore, reported the gun as being stolen. (Pacheco Aff. at ¶ 4). Officer Matshura's [sic]

report, prepared mid-day on September 10, 2001, lists the gun and accompanying holster as stolen from Jacob's truck. (Matsuhara Aff., Ex. A). Jacob, further, testified that he does not know Dawson, Cisneros, Solorzano, or Garcia. (Pacheco Aff. at ¶ 6). Therefore, the fact that the gun found next to Garcia's body was apparently stolen from a Gilroy reserve police officer is supported by the evidence and negates any inference that Dawson had the gun and planted it at the scene. Accordingly, plaintiffs have provided no evidence to support a claim that the gun was placed at the scene by the officer.

b. Whether Garcia was Turning Back Towards Dawson

Plaintiffs contend that Garcia was not twisting or turning back towards Dawson when he was shot. The autopsy report of Dr. Schmunk, the County's Chief Medical Examiner, states that the path of the bullet through Garcia's body was "from back to front, approximately 20 degrees upward and minimally from left to right." (Dr. Cooper Decl., Ex. D at 4). After reviewing the autopsy report, Dr. Melinek, also a county medical examiner, opines that the path of the bullet and Garcia's final resting position (on his back) are consistent with Dawson's description of the facts of the shooting. (Dr. Melinek Decl. ¶ 5).

Plaintiffs submit the expert opinion of Dr. Cooper, who performed an independent autopsy on Garcia. Dr. Cooper concludes that "Garcia could not have

been turning or twisting in the manner described by Deputy Dawson at the time he was shot. More precisely, from the angle of the trajectory of the bullet through Mr. Garcia's body, it is clear that [Garcia] must have been running directly away from the Deputy when he was shot." (Dr. Cooper Decl. ¶ 4). In Dr. Cooper's opinion, if Garcia had been turning around to shoot Dawson, the path of the bullet "would have exhibited a much greater variation on the horizontal axis than the minor 10 degree movement, which [he] found." (*Id.*, at ¶ 5).

Plaintiffs argue that Dr. Cooper's opinion creates a disputed issue of material fact because it directly contradicts the opinion of Dr. Melinek's that the path of the bullet through Garcia's body is consistent with Dawson's testimony that Garcia was twisting or turning. Dawson states that he did not touch Garcia's body after he had been shot. Thus, if he had been shot directly in the back and was not turning, Garcia presumably would have landed on his front side. In that situation, the fact that he was later found on his back, means that to be consistent with Dr. Cooper's opinion, Dawson, or one of the other deputies, had to have moved Garcia's body after the shooting.

Dr. Cooper's speculative opinion does not create a material issue of fact regarding Garcia's actions. Dr. Cooper failed to take into account all of Dawson's testimony. Dawson states that when he saw Garcia turning towards him, he, Dawson stopped running, took one step to the right, and then fired. The combination of Garcia's twisting in a counterclockwise

motion (moving the gun in his right hand under his left armpit), and Dawson's taking one step to the right, could have had the effect of flattening the degree of variation the path of the bullet had along the horizontal axis through Garcia's body. Yet, Dr. Cooper fails to account for this possibility. His report makes no mention of the fact that Dawson took one step to the right. (*See* Dr. Cooper Decl., Ex. B). As a result, his opinion does not take into account all the facts and thus does not effectively dispute the opinion of Dr. Melnick [sic] that the physical evidence is consistent with Dawson's description of the facts of the shooting.

2. Qualified Immunity

The court has found defendants undisputed evidence shows that Dawson's use of deadly force was objectively reasonable. Therefore, plaintiffs cannot make out a claim for excessive force in violation of the Fourth Amendment. As the court has found no constitutional violation occurred, the court does not reach the second question in the qualified immunity analysis.

B. §1983 Claim for Unreasonable Delay of Medical Treatment

Plaintiffs also allege that Dawson violated Garcia's constitutional right to be free from unnecessary delay in receiving necessary medical care. The Supreme Court has found that the deliberate indifference to serious medical needs of prisoners is proscribed by

the Eighth Amendment. *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). The Court held that peace officer's intentionally denying or delaying prisoners access to medical care is an Eight Amendment violation and can be addressed under § 1983. *Id.* In *Revere v. Massachusetts General Hosp.,* 463 U.S. 239 (1983) the Court held that persons "injured while being apprehended by the police" have a due process right to appropriate medical care. *Id.* at 244.

Plaintiffs argue that there is a question of fact regarding how long Dawson and the other deputies delayed before requesting medical assistance for Garcia. Dawson and the dispatcher both say the request for medical care was made immediately after the shooting. Plaintiffs point to the report of Itson, the first medical personnel to respond, which states that he did not receive a request until 1:00 p.m. Plaintiffs' evidence suggests a delay of approximately forty minutes before medical assistance was sought. Therefore, this evidence creates a disputed issue of fact.

In order to preclude a grant of summary judgment, the disputed issue of fact must be material. Fed. R. Civ. P. 56(a). In *Martinez v. California,* 444 U.S. 277, 285 (1980) the Supreme Court made clear plaintiffs cannot recover under § 1983 unless they show the alleged constitutional violation was the proximate cause of their injury. *See also Brower v. County of Inyo,* 489 U.S. 593, 599 (1989). This means that plaintiffs must show that a forty minute delay in requesting medical treatment for Garcia if it occurred

was the proximate cause of Garcia's death. The evidence shows this was not the case.

Cisneros checked Garcia immediately after the shooting and found no signs of life. In addition, the coroner's report states that the internal injuries were so severe more immediate medical treatment most likely would not have prevented Garcia's death. In short, the evidence demonstrates that Garcia was dead almost immediately after the shooting. Plaintiffs submit no evidence which disputes this fact. Therefore, the alleged delay in requesting medical treatment was not a proximate cause of Garcia's injury, and thus cannot be the basis for § 1983 liability. Consequently, the court dismisses plaintiffs' § 1983 claims predicated on the unreasonable delay in requesting or providing medical care.

C. Monell Claim

In addition to suing Dawson, plaintiffs have sued the County under § 1983. A county may be chargeable with § 1983 liability under at least three theories. First, "[a] local government entity is liable under § 1983 when 'action pursuant to official municipal policy of some nature cause[s] a constitutional tort.'" *Oviatt v. Pearce*, 954 F.2d 1470, 1473-74 (9th Cir. 1992) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). Second, a county may be liable if it has a "policy of inaction and such inaction amounts to a failure to protect constitutional rights." *Id.* at 1474 (citing *City of Canton v. Harris*, 489 U.S. 378, 388

(1989)); *see also Monell,* 436 U.S. at 690-91. Third, a county may be liable if after a subordinate's conduct causes a constitutional violation, a final policymaker consciously choses [sic] to ratify or approve that subordinate's conduct. *Haugen,* 351 F.3d at 393. The critical element required under all three theories is that plaintiffs suffered a violation of constitutional rights. *See Lee v. City of Los Angeles,* 250 F.3d 668, 681 (9th Cir. 2001) (to state a *Monell* claim "a plaintiff must show that his or her constitutional 'injury would have been avoided' had the governmental entity properly trained its employees"); *see also* 42 U.S.C. § 1983 (predicating liability on the deprivation of constitutional rights).

Plaintiffs brings *Monell* claims based on all three theories Plaintiffs argue that the County failed to adequately train its deputies leading to Dawson's allegedly improper use of deadly force against Garcia. Plaintiffs also argue that the County engaged in a custom or policy of allowing unfit, overly aggressive deputies to come in contact with citizens. Finally, plaintiffs argue that the County's final policymakers ratified Dawson's killing of Garcia by exonerating him for the shooting and accepting pretextual justifications in the investigation of the incident.

All three of plaintiffs' *Monell* theories fail because plaintiffs have failed to establish that Dawson violated Garcia's constitutional rights. Without an underlying violation by a County employee, plaintiffs cannot assert a § 1983 claim against the County

under *Monell.* Therefore, plaintiffs' *Monell,* claims must be dismissed.

D. State Claims of the Estate of Fernando Garcia

An injured party may not maintain an action for damages for death or injury to person against a public entity unless a claim has been presented to the entity within six months after the accrual of the cause of action. Cal. Gov. Code §911.2, §945.6. "Where two or more persons suffer separate and distinct injuries from the same act or omission, each person must submit a claim, and one cannot rely on a claim presented by another." *Nelson v. County of Los Angeles,* 113 Cal. App. 4th 783, 796 (2003).

> Because this rule is based on the purpose of the claim statutes – which is to provide sufficient information to enable the entity to adequately investigate claims and to settlement [sic], if appropriate, without the expense of litigation – the statutory requirements have not been met by the person who has not filed a claim, and the doctrine of substantial compliance (which applies only when there is a defect in form but the statutory requirements have otherwise been met) does not apply.

Id. (internal citations omitted).

Plaintiffs have filed only one governmental tort claim. On March 7, 2002 plaintiffs Eddie Garcia,

Cynthia Garcia, Eddie Garcia Jr., Devana [sic] Garcia, and Justin Garcia filed a timely claim. (Knudson Aff. at ¶4). The claim did not include the Estate of Fernando Garcia as a claimant. (*Id.* Defendants contend that the claims of the Estate must now be barred for failure to satisfy the governmental tort claims presentation requirements.

Plaintiffs rely on *White v. Moreno Valley Unified School District,* 181 Cal. App. 3d 1024, 1031 (1986) to argue that where a plaintiff has not actually filed a separate claim but the claim encompasses all of the events giving rise to the claim, the courts may allow it under the doctrine of substantial compliance. This argument was rejected in *Nelson,* a case with a similar factual context. 113 Cal. App. 4th at 797 n. 10.

In *Nelson,* Dwayne Nelson was killed by being restrained in a hog-tie fashion by the police causing him to suffocate. *Id.* His mother, Mrs. Nelson, filed a governmental tort claim, listing herself as the only claimant. *Id.* However, she filed a complaint asserting claims individually and on behalf of Dwayne's estate as his personal representative. *Id.* at 796. She argued that her claim substantially complied with the claim filing requirements for purposes of allowing Dwayne's estate to bring a claim. *Id.* In rejecting Mrs. Nelson's argument, the court explicitly distinguished her situation from that in *White. Id.* at 797 n. 10. The court explained that unlike *White,* "Mrs. Nelson's claim form did not identify the estate and did not identify Mrs. Nelson as Dwayne's personal representative. It did not identify any damages recoverable by

the estate (e.g. pre-death medical expenses or other expenses suffered by Dwayne before his death)." *Id.* In highlighting the distinction between form versus substance, when applying the doctrine of substantial compliance, the court explained, "[t]he problem here is not that Mrs. Nelson's claim was defective, but that no claim at all was filed by or on behalf of Dwayne's estate." *Id.* at 798.

The court finds *Nelson* to be controlling here. The Estate of Fernando Garcia did not file a claim. (*See* Knudson Aff., Ex. A). Nothing in the claim form plaintiffs filed suggests the claim was filed by other than the named claimants' in their individual capacities. Finally, damages described in the claim were for "the wrongful death of the decedent, Fernando Garcia," with no mention of any damages incurred by Fernando before his death. (*Id.*). Therefore, the state claims of the Estate of Fernando Garcia are barred.

E. Immunity against State Torts Based on Justifiable Homicide

Defendants argue that plaintiffs' state claims for (1) intentional infliction of emotional distress; (2) negligence; (3) negligent selection, training, retention, supervision, investigation, and discipline; (4) negligent wrongful death; and (5) intentional wrongful death, must be dismissed because Dawson's use of deadly force was justified. In California, there is no civil liability when a homicide is justified. Cal. Pen. Code § 196; *see Martinez v. County of Los Angeles*, 47

Cal. App. 4th 334, 349 (1996) (granted summary judgment in favor of defendants because decedent's death resulted from a justifiable homicide under Cal. Pen. Code § 196).

"The test for determining whether a homicide was justifiable under Penal Code § 196 is whether the circumstances 'reasonably create[d] a fear of death or serious bodily harm to the officer or to another.'" *Martinez,* 47 Cal. App. 4th at 349 (quoting *Kortum v. Alkire,* 69 Cal. App. 3d 325, 333 (1977)). For the reasons discussed in connection with the section 1983 claim, Dawson's use of deadly force was objectively reasonable and constitutes justifiable homicide under Penal Code § 196. As a result, Dawson is not liable under state law for the shooting. In addition, a public entity is not liable for an injury resulting from the conduct of an employee of the public entity where the public employee is immune from liability. Therefore, the County is not responsible for Garcia's death.

III. ORDER

For the foregoing reasons, the court grants defendants' motion for summary judgment.

DATED: 9/29/04

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDDIE GARCIA;
EDDIE STEVE GARCIA;
CYNTHIA GARCIA, on behalf of herself and as Guardian ad Litem for DEVANNA GARCIA, JUSTINE GARCIA; and ESTATE OF FERNANDO GARCIA,

Plaintiffs,

v.

SANTA CLARA COUNTY; DEPUTY SHERIFF DAWSON; and DOES 1-100,

Defendants.

E-FILED – 9/29/04

CASE NO.:
C-02-04360-RMW

JUDGMENT

On September 29, 2004, the court issued its order granting judgment for defendants. Therefore,

IT IS HEREBY ORDERED that judgment be entered in favor of defendants and that plaintiffs take nothing by way of their complaint.

DATED: 9/29/04

/s/ **Ronald M. Whyte**
RONALD M. WHYTE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

EDDIE GARCIA; EDDIE STEVE GARCIA; CYNTHIA GARCIA, on behalf of herself and as Guardian ad Litem for DEVANNA GARCIA, JUSTINE GARCIA; and ESTATE OF FERNANDO GARCIA,

Plaintiffs,

v.

SANTA CLARA COUNTY; DEPUTY SHERIFF DAWSON; and DOES 1-100,

Defendants.

Case No.: C-02-04360-RMW

ORDER DENYING MOTION FOR RELIEF

[Re: Docket # 175]

E-FILED - 4/6/06

Pending before the court is plaintiffs' motion for relief pursuant to Fed. R. Civ. P. 59(e) and 60(b)) from the judgment entered in this case on September 29, 2004 following the grant of defendants' motion for summary judgment. Plaintiffs offer additional evidence in support of their motion and essentially argue that this evidence, along with what had previously be [sic] offered, presents a triable issue of fact. The court disagrees. First, the additional evidence offered was available, or at least could have been discovered with

reasonable diligence, by the time plaintiffs filed their original opposition to defendants' summary judgment motion. *See Shalit v. Coppe,* 182 F.2d 1124,1132 (9th Cir. 1999) ("The law is clear that reconsideration is appropriate only in very limited circumstances, and that the overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into newly discovered evidence); *Frederick S. Wyle Prof'l Corp. v. Texaco,* 764 F.2d 604, 609 (9th Cir. 1985) (internal quotations omitted). Second, the evidence presented prior to the hearing on the summary judgment motion established no material issues of disputed fact. Finally, there has been no intervening change of controlling law, new evidence discovered, or need to correct a clear error or prevent manifest injustice. *See Pyramid Lake Paiute Tribe of Indians v. Hodel,* 882 F.2d 364, 369 n.5 (9th Cir. 1981).

The motion for relief is denied.

DATED: 3/31/06

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge